

SENATE BILL 3864

By Kyle

AN ACT to amend Tennessee Code Annotated, Title 48,
Chapter 2, Part 1, relative to regulation of
securities.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 48-2-102, is hereby amended by deleting the section in its entirety and replacing it with the following:

(1) "Accredited investor" means accredited investor, as that term is defined in Rule 501 of Regulation D under the Securities Act of 1933 (17 C.F.R. § 230-501), as amended;

(2) "Affiliate" means a person who directly, or indirectly through one (1) or more intermediaries, controls, or is controlled by, or is under common control with, another person;

(3) "Agent" means any individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities from, in or into this state. A partner, officer, director or manager of a broker-dealer, or a person occupying similar status or performing similar functions, is an agent only if such person otherwise comes within this definition or receives compensation specifically related to purchases or sales of securities from, in or into this state. "Agent" does not include such other persons not within the intent of this subdivision as the commissioner may, by rule, exempt from this definition as not in the public interest and necessary for the protection of investors;

(4) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others, or any person engaged in the

business of buying or selling securities issued by one (1) or more other persons for such person's own account and as part of a regular business rather than in connection with such person's investment activities. "Broker-dealer" does not include:

(A) Issuers, except to the extent provided in § 48-2-110(f);

(B) An agent;

(C) An institutional investor;

(D) A person who has no place of business in this state and who is registered as a broker-dealer with the securities and exchange commission or the National Association of Securities Dealers if:

(i) The person effects transactions in this state exclusively with or through:

(a) The issuers of the securities involved in the transactions;

(b) Other broker-dealers; or

(c) Institutional investors; or

(ii) During any period of twelve (12) consecutive months, the person does not effect more than fifteen (15) transactions in securities from, in, or into this state (other than to persons specified in subdivision (4)(D)(i)); or

(E) Such other persons not within the intent of this subdivision (4) as the commissioner may by rule exempt from this definition as not in the public interest and necessary for the protection of investors;

(5) "Canadian retirement account" means a trust or other arrangement, including, but not limited to, a "registered retirement savings plan" or "registered retirement income fund" administered under Canadian law, that is managed by the

natural person who contributes to, or is or will be entitled to receive the income and assets from such account;

(6) "Commissioner" means the commissioner of commerce and insurance;

(7) "Control," including "controlling," "controlled by," and "under common control with," means the possession, directly or indirectly, of the power to direct or compel the direction of the management or policies of a person, whether through the ownership of voting securities, by contract, or otherwise;

(8) "Covered security" means any security:

(A) Listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange or listed on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) Listed, or authorized for listing on a national securities exchange (or tier or segment thereof) that has listing standards that the securities and exchange commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subdivision (8)(A);

(C) That is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subdivision (8)(A) or (B);

(D) Issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940;

(E) Sold to qualified purchasers, as defined by the securities and exchange commission; or

(F) That is issued in connection with a transaction that is exempt from registration under the Securities Act of 1933 pursuant to:

(i) Paragraph (1) or (3) of § 4 of the Securities Act of 1933, and the issuer of such security files reports with the securities and exchange commission pursuant to § 13 or 15(d) of the Securities and Exchange Act of 1934, as amended;

(ii) Section 4(4) of the Securities Act of 1933;

(iii) Section 3(a) of the Securities Act of 1933, other than the sale of a security that is exempt from such registration pursuant to paragraph (4) or (11) of § 3(a) of the Securities Act of 1933, except that a municipal security that is exempt from registration under the Securities Act of 1933 pursuant to paragraph (2) of § 3(a) of that act is not a “covered security” with respect to the sale of such security in Tennessee if the issuer of such security is located in Tennessee;

(iv) Securities and exchange commission rules or regulations issued under paragraph (2) of § 4 of the Securities Act of 1933;

(9) “Institutional investor” means a bank (unless the bank is acting as a broker-dealer as such term is defined in § 48-2-109(a)), trust company, insurance company, investment company registered under the Investment Company Act of 1940, as amended, a holding company which controls any of the foregoing, a trust or fund over which any of the foregoing has or shares investment discretion, a pension or profit-sharing plan, an institutional buyer (as the commissioner may further define by rule), or any other person engaged as a substantial part of its business in investing in securities unless such other person is within the definition of a broker-dealer in the first sentence of subdivision (4) (in which case such other person is not an institutional investor), in each case having a net worth in excess of one million dollars (\$1,000,000);

(10) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, buying, or selling securities, or who for compensation and as a part of a regular business issues or promulgates analyses or reports concerning securities. "Investment adviser" does not include:

(A) An investment adviser representative;

(B) A bank (unless it is acting as an investment adviser for a registered investment company), savings institution, or trust company;

(C) A lawyer, accountant, engineer, or teacher whose performance of investment advisory services is solely incidental to the practice of such lawyer's, accountant's, engineer's or teacher's profession;

(D) A broker-dealer whose performance of investment advisory services is solely incidental to the conduct of such person's business as a broker-dealer and who receives no special compensation for such services;

(E) A publisher of any bona fide newspaper, news magazine, or business or financial publication of general, regular, and paid circulation;

(F) A person who has no place of business in this state if:

(i) The person's only clients in this state are other investment advisers, broker-dealers, or institutional investors; or

(ii) During any period of twelve (12) consecutive months, the person does not direct business communications into this state in any manner to more than five (5) clients (other than those specified in subdivision (10)(E)(i)), whether or not such person or any of the persons

to whom the communications are directed are then present in this state;
or

(G) Such other persons not within the intent of this subdivision (10) as the commissioner may by rule exempt from this definition as not in the public interest and necessary for the protection of investors;

(11) “Investment adviser representative” means any partner, officer, or director of (or person occupying a similar status or performing similar functions) an investment adviser, or other individual, except clerical or ministerial personnel, who is employed by or associated with an investment adviser and does any of the following:

(A) Makes any recommendation or otherwise renders advice regarding securities;

(B) Manages accounts or portfolios of clients;

(C) Determines which recommendation or advice regarding securities should be given;

(D) Solicits, offers or negotiates for sale of or sells investment advisory services; or

(E) Supervises employees who perform any such actions; “Investment adviser representative” does not include such other persons not within the intent of this subdivision (11) as the commissioner may, by rule, exempt from this definition as not in the public interest and necessary for the protection of investors;

(12) “Investment-related” means any activities connected to any of the following business areas: securities, commodities, banking, insurance or real estate;

(13) “Issuer” means every person who issues any security, except that:

(A) With respect to certificates of deposit, voting-trust certificates, collateral-trust certificates, certificates of interest or shares in an unincorporated investment trust which is of the fixed, restricted management or unit type or which does not have either a board of directors or persons performing similar functions, “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement under which such securities are issued;

(B) With respect to equipment-trust certificates or like securities, “issuer” means the person by whom the property is or is to be used; and

(C) With respect to a fractional undivided interest in oil, gas, or other mineral rights, “issuer” means the owner of such right or of an interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of sale.

Any person who acts as a promoter for or on behalf of a corporation, trust, or unincorporated association or partnership of any kind to be formed shall be deemed to be an issuer of pre-incorporation subscriptions or certificates;

(14) “Person” means a natural person, a sole proprietorship, a corporation, a partnership, an association, a limited liability company, a joint-stock company, a trust, a governmental entity or agency, or any other unincorporated organization;

(15) “Promoter” means:

(A) Any person who, acting alone or in conjunction with one (1) or more persons, directly or indirectly takes the initiative in founding and organizing the business or enterprise of an issuer; or

(B) Any person who, in connection with the founding or organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration

of services or property, or both services and property, ten percent (10%) or more of any class of securities of the issuer or ten percent (10%) or more of the proceeds from the sale of any class of securities; provided, that a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this subdivision (14) if such person does not otherwise take part in founding and organizing the enterprise;

(16)

(A) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value;

(B) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value;

(C) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other property is considered to constitute part of the subject of the purchase and to have been offered and sold for value;

(D) A purported gift of an assessable security is considered to involve an offer and sale;

(E) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert such security into another security of the same or another issuer, is considered to include an offer of the other security;

(F) The terms defined in this subdivision do not include any bona fide:

(i) Gift other than as set forth in subdivision (15)(D);

(ii) Transfer by death;

(iii) Transfer by termination of a trust;

(iv) Pledge or security loan;

(v) Stock split or reverse stock split;

(vi) Security dividend, whether the security is issued by the same or another company, if nothing of value is surrendered by security holders for the security dividend other than the right to a cash or property dividend where each security holder may elect to take the dividend in cash or property or in stock;

(vii) Act incident to a class vote by stockholders, pursuant to the charter or the applicable corporation statute, on a merger, consolidation, recapitalization, or sale of assets in exchange for securities of another corporation; or

(viii) Act incident to a judicially approved transaction in which a security is issued in exchange for one (1) or more outstanding securities, claims, or property interests, or part in such exchange and partly for cash;

(17) "Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, a life settlement contract, as defined in § 56-50-102, or any fractional or pooled interest in a life insurance policy or life settlement contract, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate

for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include:

(A) Currency;

(B) A check (whether or not certified), draft, bill of exchange, or bank letter of credit;

(C) A note or other evidence of indebtedness issued in a mercantile or consumer, rather than an investment, transaction;

(D) An interest in a deposit account with a bank or a savings and loan association; or

(E) An insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period;

(18) "Senior security" means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends; and

(19) "Underwriter" means any person who has purchased from an issuer or an affiliate of an issuer with a view to, or who sells for an issuer or an affiliate of an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; provided, that a person shall be presumed not to be an underwriter of a security which such person has owned beneficially for two (2) years or more; and provided further, that a broker-dealer shall be presumed not to be an underwriter with respect to any security which does not represent part of an unsold allotment to or subscription by the broker-dealer as a participant in the distribution of

such security; and provided further, that in the case of any security acquired on the conversion of another security without payment of additional consideration, the length of time such convertible security has been beneficially owned by such person shall include the period during which such convertible security was beneficially owned and the period during which the security acquired on conversion was beneficially owned.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.